Madeli bin Salleh (suing as administrator of the estate of Salleh bin Kilong, deceased) v Superintendent of Lands and Surveys, Miri Division & Anor

COURT OF APPEAL (KUCHING) — CIVIL APPEAL NO Q–01–94 OF 2000

ABDUL KADIR SULAIMAN, TENGKU BAHARUDIN SHAH JJCA AND CLEMENT SKINNER J

1 APRIL 2005

Civil Procedure — Pleadings — Plea of confession and avoidance — Effect of — Whether defendant carried burden of proving facts they pleaded by way of avoidance — Whether defendant bound by the plea — Whether trial judge misdirected himself in considering issue already admitted by defendant

Native Law and Custom — Land dispute — Customary rights over land — Land was former Shell Concession Area — Whether native customary land could be created — Whether rights extinguished by legislation prior to 1 January 1958 — Whether occupation of land must include actual physical presence at all times — Land Code (Sarawak Cap 81) ss 5(1), (2), 10, 43 — Land Ordinance (Sarawak Cap 27) 1932 Part IX, ss 98, (1), 99

It was alleged by the plaintiff ('the appellant') that for many years prior to 1January 1958 the appellant's father and later the appellant, a Malay, a native race of Sarawak, had acquired and exercised native customary rights over a piece of land situated along the Miri/Pujut Road ('the land') by clearing it, occupying it and planting crops such as rubber and fruit trees thereon. By a Notification published in the Sarawak Government Gazette dated 24 December 1982 ('the 1982 Notification') the second respondent declared the land to be a Government reserve for the purpose of a park, but later went on to build a religious school on it. It was the appellant's case that the respondents should have paid him compensation for his native customary rights to the land before issuing the 1982 Notification. The material facts as far as the appellant's claim to native customary rights only were concerned, were pleaded in paras 3 and 4 of his statement of claim.

The respondents' defences to the appellant's claim to native customary rights were essentially that: (i) they admitted that the appellant had acquired native customary rights over the land as claimed, but contended that as it was formerly 'ex-Shell Concession Area' no such rights could have been created over the land; and (ii) since the appellant had not acquired any native customary rights over the land the need to extinguish his alleged rights did not arise. Theappellant submitted that by so pleading, the respondents had adopted a defence of 'confession and avoidance' to his claim to native customary rights over the land. However, the Judicial Commissioner dismissed the appellant's claim for a declaration that he had acquired native customary rights to the land.

It was not in dispute between the parties that from 1921 onwards the land fell within the Shell Concession Area. The government exercised its right to except the land from the Shell Concession Area ('the excepted area') via Land (Excepted Area) Order 1964. The issues were: (1) was the land claimed by the plaintiff as his native customary rights land an ex-Shell Concession Area; (2) whether, by virtue that it was an ex-Shell Concession Area, no native customary rights could be created or acquired by the plaintiff; and (3) was there any need for the second defendant to extinguish the plaintiff's native customary rights over the land and to pay him compensation before declaring the land to be a Government reserve.

The learned Judicial Commissioner came to a finding that the land became an excepted area at the earliest in 1954. He held that native customary rights could not be acquired over the land while it formed a part of the Shell Concession Area from 1921 and ending at the earliest in 1954 ('the relevant period'). He also held that the appellant could not have acquired native customary rights over the land between 1954 and 1 January 1958 since the appellant moved out from the land when the house he lived in was destroyed by fire in 1941 although the fruit trees were still there.

The appellant's main grounds of appeal were that since the respondents were only able to show that the land remained within the Shell Concession Area until 1954, by their plea of confession and avoidance, they must be taken to have admitted that between 1954 and 1 January 1958 the appellant had acquired native customary rights to the land. Therefore, it was submitted that the issue whether the appellant had acquired native customary rights between the period beginning from 1954 to 1 January 1958 should not have been considered at all because when the respondents admitted the appellant's assertion that he had acquired native customary rights over the land before 1 January 1958, which would include the period beginning from 1954 to 1 January 1958 as well, once the respondents were unable to prove that the land remained within the Shell Concession Area until at least 1 January 1958, they became bound by their admission thereby rendering the question no longer open for determination.

Held, allowing the appeal:

(1) By para 3 of the defence, the respondents had invoked the plea of confession and avoidance, by expressly admitting or confessing to or assuming the truth of the material facts alleged in paras 3 and 4 of the appellant's statement of claim, but seeking to avoid the legal consequences of those facts by alleging that the land was ex-Shell Concession Area. Accordingly, the respondents carried the burden of proving the facts they pleaded by way of avoidance (see para 40). Here the plea of confession and avoidance was not any alternative plea; it was the sole plea to the material allegations made by the appellant in paras 3 and 4 of the statement of claim. The respondents were accordingly bound by their plea (see para 44).

(2) The learned Judicial Commissioner erred in law when he failed to appreciate that once he found that the respondents had failed to discharge their burden of proving the facts relied on by them to avoid the legal consequences of their admission of the appellant's claim to have acquired native customary rights to the land prior to 1 January 1958, the appellant became entitled to judgment as the respondents were bound by their admission which meant that at the very least, during the years beginning from 1954 until 1 January 1958, when the land was no longer reserved as Shell Concession Area, the appellant had acquired native customary rights to the land (see para 46). It must also follow that once the respondents become bound by their admission that the appellant had acquired native customary rights over the land prior to 1 January 1958, which must, by necessary implication, include that period commencing 1954 until 1 January 1958, it was no longer open to the learned Judicial Commissioner to enter into a consideration of whether the appellant had acquired any native customary rights between 1954 and 1 January 1958. He misdirected himself when he did so (see para 49).

(3) Even if it can be successfully argued that it was open to the learned Judicial Commissioner to consider the question whether the appellant had acquired native customary rights between 1954 and 1 January 1958, the learned Judicial Commissioner erred when he held that the appellant had not done so (see para 50). The appellant did not lose his rights when he moved out of the land in 1941, since the fruit trees were still there and he continued to visit the land once a month. The learned Judicial Commissioner appeared to have equated occupation with actual physical presence on the said land when that need not necessarily be so (see para 51). Furthermore, the methods specified in s 5(2) of the Land Code to for the creation of native customary rights were not applicable in this case since it was only applicable as from 1 January 1958, whereas the issue in this case was whether such rights had been created or acquired between 1954 and 1 January 1958; and proviso (ii) of s 5(2) of the Land Code expressly directs that that question shall be determined by the law in force immediately prior to 1 January 1958 (see para 53). Such rights were also not extinguished when the land was reserved as part of the Shell Concession Area under the 1921 Order (see para 73).

[**Bahasa Malaysia summary**

Ia dikatakan oleh plaintif ('perayu') bahawa selama bertahun-tahun sebelum 1Januari 1958 bapa perayu dan kemudian perayu, seorang Melayu, suatu kaum asli di Sarawak, telah memperolehi dan melaksanakan hak adat asli ke atas tanah yang berlokasi di kawasan Jalan Miri/Pujut ('tanah tersebut') dengan membersihkannya, menduduki tanah tersebut dan menanam tanaman seperti getah dan pokok buah-buahan. Melalui sebuah Notifikasi yang diterbitkan

didalam Sarawak Government Gazette bertarikh 24 Disember 1982 ('Notifikasi 1982 tersebut') responden kedua mengisytiharkan tanah tersebut sebagai tanah rizab Kerajaan untuk dijadikan sebuah taman, tetapi kemudian membina sebuah sekolah agama di atas tanah tersebut. Adalah kes perayu bahawa responden-responden patut membayar pampasan kepadanya kerana hak adat aslinya sebelum mengeluarkan Notifikasi 1982 tersebut. Fakta-fakta material mengenai tuntutan perayu kepada hak adat aslinya terdapat di perenggan 3 dan 4 penyata tuntutannya.

Pembelaan responden-responden terhadap tuntutan perayu adalah: (i) mereka mengakui bahawa perayu telah memperoleh hak adat asli ke atas tanah tersebut seperti yang dinyatakan tetapi responden mengatakan bahawa oleh kerana tanah tersebut dahulunya merupakan 'ex-Shell Concession Area' hak tersebut tidak boleh diwujudkan ke atas tanah tersebut; dan (ii) oleh kerana perayu tidak memperolehi apa-apa hak adat asli ke atas tanah tersebut, keperluan untuk mengambil alih hak tersebut tidak timbul. Perayu menyatakan bahawa dengan membuat pliding tersebut responden telah menggunakan pembelaan 'confession and avoidance' terhadap tuntutannya berkenaan dengan hak adat aslinya ke atas tanah tersebut. Namun tetapi, Pesuruhjaya Kehakiman menolak tuntutan perayu untuk deklarasi bahawa dia telah memperolehi hak adat asli terhadap tanah tersebut.

Adalah tidak dipertikaikan di antara kedua pihak bahawa dari 1921 tanah tersebut terletak di dalam 'Shell Concession Area'. Kerajaan telah menggunakan kuasanya untuk mengecualikan tanh itu dari menjadi 'Shell Concession Area' melalui Perintah Tanah (Kawasan yang dikecualikan 1964). Isu-isu adalah: (1) sama ada tanah tersebut yang dituntut oleh plaintif sebagai tanah adat aslinya adalah tanah 'ex-Shell Concession Area'; (2) sama ada, oleh sebab tanah tersebut terletak di dalam ex-Shell Concession Area, tiada hak adat asli boleh diwujudkan atau diperolehi oleh plaintif; dan (3) adakah perlunya untuk defendan kedua untuk mengambil alih hak adat asli plaintif terhadap tanah tersebut dan untuk membayar pampasan sebelum mengisytiharkan tanah tersebut sebagai tanah rizab Kerajaan.

Pesuruhjaya Kehakiman yang bijaksana tersebut mendapati bahawa tanah tersebut menjadi tanah yang dikecualikan seawal-awalnya pada 1954. Dia mendapati bahawa hak adat asli tidak boleh diperolehi ke atas tanah tersebut selagi tanah tersebut adalah sebahagian daripada Shell Concession Area daripada 1921 dan tamat seawal-awalnya pada 1954 ('tempoh relevan tersebut'). Dia juga mendapati bahawa perayu tersebut tidak boleh memperolehi hak adat asli keatas tanah tersebut pada masa antara 1954 dan 1 Januari 1958 kerana perayu telah berpindah keluar daripada tanah tersebut apabila rumahnya dibinasakan oleh api pada 1941 walaupun pokok buah-buahannya masih berada di situ.

Alasan rayuan perayu adalah oleh kerana responden-responden hanya dapat menunjukkan bahawa tanah tersebut masih berada di dalam kawasan Shell

A Concession Area hingga 1954, menerusi pliding 'confession and avoidance' mereka, mereka patut diambil sebagai mengaku bahawa pada 1954 hingga 1Januari 1958 perayu telah memperolehi hak adat asli ke atas tanah tersebut. Oleh itu, adalah dihujahkan bahawa isu sama ada perayu memperolehi hak adat asli terhadap tanah tersebut tidak patut ditimbangkan sama sekali kerana
B apabila responden-responden mengaku kepada penegasan perayu yang dia telah memperolehi hak adat asli ke atas tanah tersebut sebelum 1 Januari 1958, yang termasuk tempoh permulaan 1954 ke 1 Januari 1958 juga, bila responden-responden gagal membuktikan tanah tersebut berada di kawasan Shell Concession Area hingga sekurang-kurangnya 1 Januari 1958, mereka diikat kepada
C pengakuan mereka dan ini mengakibatkan persoalan tersebut tidak lagi dibuka untuk pertimbangan.

Diputuskan, membenarkan rayuan tersebut:

D (1) Melalui perenggan 3 pembelaan, responden-responden telah membangkitkan pli 'confession and avoidance', dengan secara jelas mengaku atau menyangkal kebenaran fakta-fakta material tersebut yang terdapat di perenggan 3 dan 4 penyata tuntutan perayu, tetapi mencuba untuk mengelak akibat di sisi undang-undang dengan menyatakan bahawa tanah tersebut merupakan ex-Shell Concession Area. Selaras dengan itu, responden-responden
E membawa beban untuk membuktikan fakta-fakta yang diplid oleh mereka dengan cara menyangkal (lihat perenggan 40). Di sini, the pli 'confession and avoidance' bukan satu hujahan alternatif; ia merupakan hujahan tunggal terhadap fakta-fakta material yang dibuat oleh perayu di perenggan 3 dan 4 penyata tuntutan. Responden-responden oleh itu diikat kepada
F hujahan mereka (lihat perenggan 44).

(2) Pesuruhjaya Kehakiman yang bijaksana tersebut telah silap di sisi undang-undang apabila dia gagal mempertimbangkan bahawa, apabila dia mendapati bahawa responden-responden telah gagal memenuhi beban
G mereka untuk membuktikan fakta-fakta yang digunakan oleh mereka untuk mengelak akibat di sisi undang-undang pengakuan mereka kepada tuntutan perayu yang perayu memperolehi hak adat asli sebelum 1Januari 1958, perayu berhak mendapat penghakiman kerana responden-responden diikat kepada akuan mereka yang bermakna bahawa sekurang-kurangnya, pada tahun-tahun bermula awal 1954 hingga 1 Januari 1958, apabila
H tanah tersebut tidak lagi tanah yang dirizab sebagai Shell Concession Area, perayu telah memperolehi hak adat asli terhadap tanah tersebut (lihat perenggan 46). Maka responden-responden diikat kepada akuan mereka bahawa perayu telah memperolehi hak adat asli terhadap tanah tersebut sebelum 1 Januari 1958, yang semestinya, melalui implikasi,
I termasuk tempoh bermula daripada 1954 sehingga 1 Januari 1958, dan adalah tidak terbuka kepada Pesuruhjaya Kehakiman yang bijaksana tersebut untuk menimbangkan sama ada perayu telah memperolehi apa-apa hak

adat asli di antara 1954 dan 1 Januari 1958. Dia telah silap apabila berbuat demikian (lihat perenggan 49).

(3) Sebaliknya, jika diputuskan bahawa adalah terbuka untuk Pesuruhjaya Kehakiman untuk menimbangkan soalan tersebut sama ada perayu tersebut telah memperolehi hak adat asli pada tempoh di antara 1954 dan 1 Januari 1958, Pesuruhjaya Kehakiman yang bijaksana tersebut masih silap apabila dia mendapati bahawa perayu tidak memperolehi hak tersebut (lihat perenggan 50). Perayu tidak kehilangan haknya apabila dia berpindah keluar daripada tanah tersebut pada 1941 kerana pokok buah-buahannya masih berada di situ dan dia tetap mengunjungi tanah tersebut sebulan sekali. Pesuruhjaya Kehakiman yang bijaksana seakan-akan menyamakan penghunian dengan kehadiran secara fizikal di atas tanah tersebut dan ini tidak semestinya benar (lihat perenggan 51). Seterusnya, kaedah-kaedah yang terkandung di dalam s 5(2) Kanun Tanah untuk mewujudkan hak adat asli tidak terpakai di dalam kes ini kerana ia hanya terpakai daripada 1 Januari 1958, manakala isu di dalam kes ini adalah sama ada hak seperti yang tersebut telah wujud atau diperolehi antara 1954 dan 1 Januari 1958; dan proviso (ii) s 5 (2) Kanun Tanah secara nyata mengarahkan bahawa soalan tersebut perlu dijawab mengikut undang-undang yang berkuatkuasa sejurus sebelum 1 Januari 1958 (lihat perenggan 53). Hak tersebut juga tidak dipadamkan apabila tanah tersebut dirizabkan sebagai sebahagian daripada Shell Concession Area di bawah Perintah 1921 (lihat perenggan 73).]

Notes

For cases on customary rights over land, see 10 *Mallal's Digest* (4th Ed, 2002 Reissue) paras 632–639.

For cases on pleadings generally, see 2(1) *Mallal's Digest* (4th Ed, 2004 Reissue) paras 1262–1814.

Cases referred to

Adong bin Kuwau & Ors v Kerajaan Negeri Johor & Anor [1997] 1 MLJ 418 (refd)
Calder v Attorney-General of British Columbia (1973)34 DLR (3d) 145 (refd)
Colonial Sugar Refining Co v Melbourne Harbour Trust Commissioners [1972] AC 343 (refd)
Hamid bin Matusin v Superintendent of Lands & Surveys & Anor [1198] MD 2 (refd)
Newcastle City Council v Royal Newcastle Hospital [1959] 1 All ER 734 (refd)
Nor Anak Nyawai v Borneo Pulp Plantation Sdn Bhd [2001] 6 MLJ 241 (refd)
Yew Bon Tew & Anor v Kenderaan Bos Mara & Anor [1983] 1 MLJ 1 (refd)

Legislation referred to

Land (Classification) Ordinance 1948 [Sarawak]
Land (Excepted Area) Order 1964 [Sarawak]

Land Code (Amendment) Ordinance 1979 [Sarawak]
Land Code (Sarawak Cap 81) ss 5(1), (2),10, 43
Land Ordinance (Sarawak Cap 27) 1932 Part IX, ss 98, (1), 99
Land Regulations (Sarawak Order No VIII) 1920 ss 1(ii), 3, 22(1), Part V
Order No L–2 (Land) 1931 [Sarawak] s 2(ii)
Order No L–7 (Land Settlement) 1933 ss 1(ii), (iii), 66, 68(1) [Sarawak]
Rajah Order (Sarawak No xxix of 1921) s 21

Appeal from: Civil Suit No MR22 of 1995 (High Court, Miri)

Mekanda Singh Sandhu (Sandhu & Co Advocates) for the appellant.
Thomas Akin Jelimin (Senior Legal Officer) (State Attorney General's Chambers) for the respondents.

Clement Skinner J (delivering judgment of the court):

[1] This is the hearing of an appeal against the decision of the learned Judicial Commissioner, Miri, who on 13 November 2000 after a full trial, dismissed the appellant's claim for a declaration that he had acquired native customary rights to a piece of land in Miri and that damages be paid to him by way of compensation for the extinguishment thereof. The appellant here was the plaintiff, while the first and second respondents were the defendants in the court below. By agreement of the parties, the learned Judicial Commissioner was requested to decide only whether the appellant was entitled to the declarations he sought, with damages to be assessed at a later date if such rights were established.

[2] The brief facts leading to the claim are these. It was alleged that for many years prior to 1 January 1958 the appellant's father and later the appellant, a Malay, a native race of Sarawak, had acquired and exercised native customary rights over a piece of land situate along the Miri/Pujut Road, forming part of Lot 660 Block 8 Miri Concession Land District (hereafter 'the said land') by clearing it, occupying it and planting crops such as rubber and fruit trees thereon. The material facts as far as the appellant's claim to native customary rights only are concerned, are pleaded in paras 3 and 4 of his statement of claim. Since a point of pleading has been taken in this appeal, we will set out what these 2 paragraphs state. They read:

> 3 The plaintiff acquired native customary rights over all that parcel of land situate at Miri/Pujut Road, Miri containing 660 acres, more or less, forming part of Lot 660 Block 8 Miri Concession District as more particularly shown and shaded in yellow in the plan annexed hereto as 'A' ('the said land') by Malay custom or adat and/or by inheritance from his father, Kilong bin Dullah and by occupation thereof. The plaintiff avers that his deceased father and his family, including himself, cleared the said land first planted it with rubber trees and later fruit trees.

4 The said native customary rights over the land had been exercised by the plaintiffs deceased father and the plaintiff himself for many years prior to the 1 January 1958 and have never been extinguished by the first defendant and/or the second defendant. A

[3] By a notification published in the Sarawak Government Gazette dated 24 December 1982 ('the 1982 Notification') the second respondent declared the said land to be a Government reserve for the purpose of a park, but later went on to build a religious school on it. It is the appellant's case that the respondents should have paid him compensation for his native customary rights to the said land before issuing the 1982 Notification. Hence the filing of this suit. It should be mentioned that in addition to the declaration just mentioned the appellant had also sought two other declarations, namely, that by 24 December 1994 the respondents' rights and title to the said land had been extinguished by the appellant's adverse possession of the same; and that the respondents' action in declaring the said land as a park constituted a wrongful interference with his rights over the same, but the appellant abandoned his claim for the latter two declarations at the hearing and proceeded only with prayers for the declaration first mentioned and damages. B C D

[4] The respondents' defence to the appellant's claim to native customary rights (as opposed to his other claims) was essentially that:

(i) they admitted that the appellant had acquired native customary rights over the said land as claimed, but contended that as it was formerly 'ex-Shell Concession Area' no such rights could have been created over the said land; E

(ii) since the appellant had not acquired any native customary rights over the said land the need to extinguish his alleged rights did not arise; and F

(iii) the development of the said land for a school was lawful as the publication of the 1982 Notification had the effect of constituting the said land as a Government reserve for the purposes stated.

[5] The style of pleading adopted by the first and second respondent in responding to paras 3 and 4 of the appellant's statement of claim has given rise to an issue in this appeal. This is what paras 3 and 4 of the defence state: G

3 The first and second defendants admit the allegation contain (sic) in paras 3 and 4 of the statement of claim but say that the said land was Ex-Shell Concession Area and no native customary right can be created and further put to (sic) the plaintiff to strictproof thereof. H

4 The first and second defendants deny that the plaintiff had acquired any native customary right and say that there is no need to extinguished (sic) any right as contain (sic) in para 5 (sic) of the statement of claim.

[6] The appellant says that by so pleading, the respondents had adopted a defence of 'confession and avoidance' to his claim to native customary rights over the said land. We shall return to this point later. I

[7] To appreciate the issues that confronted the learned Judicial Commissioner, it will be necessary to refer to certain historical facts which are not in dispute between the parties, but which were relevant to the issues before the court.

[8] Miri's reputation as the oil town of Sarawak can be traced back to the rule of the first Rajah of Sarawak who issued Rajah Order (No xxix of 1921) on 15 November 1921 ('the 1921 Order') which reserved a large tract of land in the Miri District, the exact boundaries of which are stated in the 1921 Order, for the operations of Sarawak Oilfields Limited, later known as Sarawak Shell Oilfields Limited (the 'Shell Concession Area'). For present purposes it will be sufficient to state that under s 2 of the 1921 Order, 'no person may erect any permanent building or plant upon any land within the reserved area without having obtained a permit for that purpose' ('the prohibition').

[9] It is also not in dispute between the parties that from 1921 onwards the said land fell within the Shell Concession Area. The significance of the prohibition contained in the 1921 Order is this: One of the recognised ways in which native customary rights over land in Sarawak may be acquired is by occupying it or planting it with crops or fruit trees. Therefore, after 15 November 1921 the prohibition in the 1921 Order effectively prevented anyone, including a native, from acquiring native customary rights by those methods within the Shell Concession Area, unless a permit for that purpose had been obtained. It is quite evident to us that the respondents were relying on this prohibition in the 1921 Order to defeat the plaintiffs claim; hence the style of pleading adopted by the respondents.

[10] When the laws relating to land in Sarawak were consolidated in the Land Ordinance (Cap 27) which came into effect in 1932, the provisions of the 1921 Order (including its prohibition) were incorporated into Part IX thereof as ss 98 and 99, but by 1948 the government of the day realised that land falling within the Shell Concession Area might also be required for purposes other than Sarawak Shell Oilfield Limited's operations and so an amendment was made to s 98(1) of the Land Ordinance Cap 27 to enable the government to reserve to itself the right to except from the operation of the 1921 Order, any areas of land identified in Orders issued by the Governor in Council (and later the Minister) for that purpose. The provisions of ss 98 and 99 were subsequently re-enacted as s 43 of the Land Code (Cap 81) (the 'Land Code') which came into force on 1 January 1958 with the right to except areas from the Shell Concession Area being preserved in s 43. Although s 43 was subsequently repealed by the Land Code (Amendment) Ordinance 1979 which came into force on 8 December 1979, nothing turns in this appeal upon that repeal.

[11] One such order by which the government exercised its right to except land from the operation of the 1921 Order was The Land (Excepted Area) Order 1964 published in the Sarawak Government Gazette dated 7 February 1964 ('the 1964 Order') whereby a large area of land in Miri District was excepted

from the Shell Concession Area ('the excepted area'). There is again no dispute between the parties that the said land formed part of the excepted area, but what was in dispute was when the said land became an excepted area, ie upon the publication of the 1964 Order on 7 February 1964, or at an earlier date mentioned in the 1964 Order itself. It will be seen shortly that the findings of the learned Judicial Commissioner on this point has a significant bearing on the outcome of this appeal.

[12] It will next be necessary to say something about native customary rights in Sarawak and how they are created or acquired. The law on the matter is presently embodied in sub-s (1) of s 5 of the Land Code which provides that as from the 1 January 1958, native customary rights may be created in accordance with native customary law of the community or communities concerned by the methods specified in sub-s (2). These two sub-sections read:

> 5(1) As from 1 January 1958, native customary rights may be created in accordance with the native customary law of the community or communities concerned by any of the methods specified in sub-s (2), if a permit is obtained under s 10, upon Interior Area Land. Save as aforesaid, but without prejudice to the provisions hereinafter contained in respect of Native Communal Reserves and rights of way, no recognition shall be given to any customary rights over any land in Sarawak created after 1 January 1958, and if the land is State land any person in occupation thereof shall be deemed to be in unlawful occupation of State land and s 209 shall apply thereto.
>
> (2) The methods by which native customary rights may be acquired are:
>
> (a) the felling of virgin jungle and the occupation of the land thereby cleared;
>
> (b) the planting of land with fruit trees;
>
> (c) the occupation or cultivation of land;
>
> (d) the use of land for a burial ground or shrine; or
>
> (e) the use of land of any class for right of way; or
>
> (f) any other lawful method:
>
> Provided that:
>
> (i) until a document of title has been issued in respect thereof, such land shall continue to be State land and any native lawfully in occupation thereof shall be deemed to hold by licence from the Government and shall not be required to pay any rent in respect thereof unless and until a document of title is issued to him; and
>
> (ii) the question whether any such right has been acquired or has been lost or extinguished shall, save in so far as this Code makes contrary provision, be determined by the law in force immediately prior to the 1 January 1958.

[13] As can be seen, after 1 January 1958 no recognition is given to any native customary rights created after that date by any of the methods mentioned in s 5 unless a permit to do so under s 10 of the Land Code is obtained. The parties accept it that, and correctly in our view, the question whether in any particular

case, native customary rights have been acquired prior to 1 January 1958, must be determined by the law in force immediately prior to that date.

[14] Accordingly, by agreement of the parties, the issues that were put before the learned Judicial Commissioner for his decision were these (and here we quote from his judgment):

(1) Was the land claimed by the plaintiff as his native customary rights land as described in para 3 of the statement of claim an ex- Shell Concession Area?

(2) Whether, by virtue that it was an ex-Shell Concession Area, no native customary rights could be created or acquired by the plaintiff?

(3) Was there any need for the second defendant to extinguish the plaintiffs native customary rights over the said land and to pay compensation before declaring the said land to be a Government reserve for a park or developing it into a school?

[15] On the first issue, the learned Judicial Commissioner did not need to consider the evidence on the point because counsel for the appellant admitted in submissions that the said land fell within the Shell Concession Area.

[16] To decide the second issue, the learned Judicial Commissioner found it necessary to ask himself two further questions. They were:

(i) how or when the said land became Shell Concession Area; and

(ii) how and when it was excepted therefrom?

[17] We note that it became necessary for the learned Judicial Commissioner to ask himself the two further questions because of the evidence that unfolded before him at the trial, particularly on the question when the said land became an excepted area. We say so because even though there was no dispute between the parties that: (a) the said land had became part of the Shell Concession Area from 15 November 1921 onwards; (b) it was not the appellant's case that he or his father had a permit to plant up the said land while it formed part of the Shell Concession Area; and (c) that after 1 January 1958 no recognition shall be given to native customary rights created over the said land unless a permit to do so had been obtained; yet the learned Judicial Commissioner recognised that because it was the appellant's case that he had acquired native customary rights to the said land for many years prior to 1 January 1958, quite apart from that period when the said land became part of the Shell Concession Area, there were still two other periods of time during which native customary rights could have been acquired over the said land, namely: (i) before the said land became a part of the Shell Concession Area in 1921; and (ii) at any time after the said land became excepted from the Shell Concession Area, if that event happened before 1 January 1958. It was essentially to be able to determine the two issues just mentioned that the learned Judicial Commissioner asked himself the two further questions.

WHEN DID SAID LAND BECOME PART OF SHELL CONCESSION AREA? A

[18] On this question, the learned Judicial Commissioner had no difficulty in holding that, that event occurred on 15 November 1921, pursuant to the 1921 Order.

B

WHEN DID SAID LAND BECOME EXCEPTED FROM SHELL CONCESSION AREA?

[19] On this issue, the learned Judicial Commissioner held that since the respondents had pleaded a defence of 'confession and avoidance', they carried the burden of establishing when the said land became an 'ex-Shell Concession Area'. C

[20] In deciding the specific question of when the said land became an excepted area, the learned Judicial Commissioner considered both the oral and documentary evidence that had been adduced in court on the point. The oral testimony was that of DW1 Chin Tze Tan, a senior draftsman from the Lands and Surveys Department, Miri, who was called by the respondents and who admitted that he came to court as a map reader. The documentary evidence included the 1964 Order, and two cadastral maps identified as 'A23' and 'A24'. Survey data found on the cadastral maps were explained in 'Legends' found at the foot of the maps. D

E

[21] At the trial the respondents tried to establish that the said land became an excepted area only in 1964 and relied mainly on the evidence of DW1 to do so. His evidence was that the said land was located within an area shaded light pink on 'A24' which area was in turn described in Legend No 3 on the cadastral map ' A24' as land excepted from the Shell Concession Area by the 1964 Order. DW1 was apparently able to testify to this by identifying the said land and its survey peg numbers on the cadastral plan 'A24' and then matching them with the survey peg numbers listed out in item 1 of the Schedule to the 1964 Order, which described the area to be excepted from the Shell Concession Area, which in turn showed that the matching survey peg numbers of the said land found in 'A24' and item 1 of the Schedule fell within the area coloured light pink. F

G

[22] However, DW1, who admitted in cross-examination that he did not prepare the Legends found on 'A24', was not able to explain why it was necessary to have different Legends in ' A24' or for the differences appearing in these Legends. H

[23] After evaluating the evidence before him on the point the learned Judicial Commissioner said that while he accepted that as a map reader, DW1 was competent to interpret the data in 'A23' and 'A24' and compare them with the data given in the Schedule to the 1964 Order, it was the responsibility of the court, and not that of DW1, to determine when the said land became an excepted area. The learned Judicial Commissioner then said: I

From reading Legend No 3 in 'A24' I find that the areas covered thereby include the areas which were excepted both under the 1964 Order and the earlier Orders and by reason thereof the date when the said land became an excepted area cannot be ascertained by the construction and interpretation of 'A24' alone.

[24] The learned Judicial Commissioner also went on to say:

> From the explanatory note (to the 1964 Order) it is apparently clear that the areas of land as appearing in items 1 and 11 thereto not only cover the areas sought to be excepted by the said Order but also includes areas of land which were previously excepted under the said sub-s 43(2), which areas are as described in the items specified in the Land (Excepted Area) Order (VOL VIII P 164) (the 'Vol VIII Order'). Since the area of the said land is included in item 1 of the Schedule to the 1964 Order it is not possible by looking at the 1964 Order alone to ascertain whether or not such area was excepted by the said Order. The Vol VIII Order is a Government Gazette and by virtue thereof I can give judicial notice to it. Upon closer perusal it is without doubt that the Vol VIII Order is the Principal Order incorporating all Orders previously made relating to the declaration of excepted areas, the earliest of which was granted in 1954.

[25] Accordingly, the learned Judicial Commissioner came to a finding that the said land became an excepted area at the earliest in 1954. This is what he said in his judgment on the matter (at p 12):

> In the absence of any evidence to the contrary it is not possible for me to determine whether the area of the said land is included in the areas of land earlier excepted under the Vol VIII Order. In view of this uncertainty it cannot be said that the said land was excepted by the 1964 Order but however it can be safely concluded from the Vol VIII Order that the said land became an excepted area not earlier than 1954, being the year when the first Order was made under the Vol VIII Order.

[26] The appellant has been careful to state in his Memorandum of Appeal that he appeals against the whole of the decision of the learned Judicial Commissioner except the above finding, which he relies on as one of his main grounds of appeal.

[27] The finding of the learned Judicial Commissioner on when the said land became an excepted area was not appealed against by the respondents either, but at the hearing of this appeal counsel for the respondents invited us to review the finding of the learned Judicial Commissioner to determine whether it was correctly made. We must decline to do so as it was never appealed against, and the learned Judicial Commissioner was well entitled to arrive at the finding which he did on the evidence before him.

WERE NATIVE CUSTOMARY RIGHTS ACQUIRED BETWEEN 1921 AND 1954?

[28] Having determined when the said land became an excepted area, the learned Judicial Commissioner went on to determine the following question

to decide the second issue, namely, whether native customary rights could be acquired over the said land while it formed a part of the Shell Concession Area from 1921 and ending at the earliest in 1954 ('the relevant period'). On this question the learned Judicial Commissioner found that the appellant had not acquired any such rights for the following reasons:

1.1 during the relevant period, notwithstanding that it was reserved for the operations of Sarawak Shell Oilfields Limited, the said land retained its status as state land;

1.2 that since the said land was both state land and reserved land during the relevant period, for the appellant to show that he had acquired native customary rights during that period, he must first prove that he was in occupation of the said land (being reserved land) in accordance with the conditions prescribed under the relevant laws — ie that he had obtained a permit to occupy and plant up the said land in view of the prohibition contained in the 1921 Order which prohibition was carried through to and preserved in ss 98 and 99 of the Land Ordinance Cap 27 and then s 43 of the Land Code;

1.3 that the appellant had failed to adduce any evidence whatsoever that he occupied the said land under permit during the relevant period.

[29] Nothing turns in this appeal on those reasons, since it is not the appellant's case that his native customary rights were first created or acquired between 1921 and 1954.

WERE NATIVE CUSTOMARY RIGHTS ACQUIRED BEFORE 1921?

[30] Having concluded that the appellant had not acquired any native customary rights while the said land was a part of the Shell Concession Area, the learned Judicial Commissioner went on to consider whether native customary rights could have been acquired prior to 1921, since it was the appellant's case that he had done so. On this issue, it was the appellant's case that native customary rights had been acquired when the said land was cultivated with rubber and fruit trees by his father and grandfather prior to 15 November 1921, given the fact that the appellant was born on the said land in 1922, which he later inherited. The appellant accordingly contended that native customary rights had been acquired under the Land Regulations — Order No VIII 1920 ('the 1920 Regulations') which, although when it came into effect in 1923 repealed all previous Orders relating to land (mentioned in its schedule), continued to preserve the validity of anything done under the repealed Orders when it stated in s 1; (ii) that 'nothing shall affect the past operation of those orders or the validity or invalidity of anything done or effected, or of any right title or interest created under those others before the commencement hereof. Under s 3 of the 1920 regulations 'State Land' was 'divided into the following

A classes — that is to say: (a) Town and suburban lands; (b) Country lands of 100 acres and over, (c) Country lands of under 100 acres, and (d) Native holdings'. And under Part V of the 1920 Regulations, section 22 (1) which relates to Native Holdings states that:

B Native Holdings

(i) Under this part lands may be occupied by Natives free of all charges for the cultivation of fruit trees, padi, vegetables, pineapples, sugar cane, bananas, yams and similar cultures in accordance with the customary laws provided that where possible claims to fruit tress and fanning lands shall beregistered. Records of such claims C shall be kept by all Native Headmen and also in the Land Office in each district.

(ii) A certificate in the form of Schedule A of Notification No of 1920 may be issued to registered land holders under this part.

D **[31]** On this particular issue, the learned Judicial Commissioner found that no native customary rights had been acquired to the said land before it was reserved as Shell Concession Area in 1921 because:

(1) he found that the law relating to land in force immediately before 1 January 1959 were the Land Ordinance (Cap 27) into which the 1921 E Order was incorporated, Order No L–2 (Land) 1931 ('the 1931 Order'), Order No L–7 (Land Settlement) 1933 ('the 1933 Order') and the Land (Classification) Ordinance 1948. In arriving at this finding the learned Judicial Commissioner found that the Land Regulations — Order No VIII 1920 ie the 1920 Regulations was not a law in force immediately before 1 January 1958 and could not be considered in determining whether F native customary rights had been acquired or extinguished before that date, as it had been repealed by the 1931 Order, which according to him, repealed all previous Orders and Regulations relating to land, other than the 1921 Order;

G (2) Section 22 of the 1920 Regulations did not have the effect of creating native customary rights over land or for the acquisition of such rights over land because it provides that natives who are registered thereunder have the right to occupy only and not to title; whereas, in the judgment of the learned Judicial Commissioner, 'the creation of native customary rights in land under the law relating thereto must mean the acquisition H of rights attached to the land where the person having such right may be issued with a title thereto or be paid compensation for the extinguishment of such right'. And according to the learned Judicial Commissioner, 'native customary rights was first given recognition in Sarawak under s 66 of the 1933 Order (ie Order No L–7 (Land Settlement) 1933) which were retained I and re-enacted in s 5 of the Land Code'. We pause here to note that the 1933 Order, which was stated in its introduction to be an Order to provide for Land Settlement, states in s 66, which relates to Native Holdings, that:

Native Holdings

Section 66 native customary rights shall be held to be:

(a) Land planted with fruit trees, when the number of fruit trees amount to twenty and upwards to each acre.

(b) Land that is in continuous occupation or has been cultivated or built on within three years.

(c) Burial grounds or shrines.

(d) Usual rights of way for men and animals from rivers, roads or homes to any or all of the above.

And we further note that s 68 (1) of the 1933 Order reads:

68(i) If a native establishes a native customary right in any land the Settlement Officer may at his discretion:

(a) issue a title in respect thereof; or with the consent of the native to other land; or

(b) pay the native money compensation therefore.

(3) After the said land had become reserved for the Shell Concession Area the appellant was in unlawful occupation of State Land, and hence a squatter as he did not have a permit to occupy it or plant it up.

(4) Even if the appellant had acquired native customary rights under the 1920 Regulations, such rights were extinguished when the said land was reserved as part of the Shell Concession Area under the 1921 Order.

[32] The appellant complains that the learned Judicial Commissioner misdirected himself in law when he came to the above findings.

WHETHER NATIVE CUSTOMARY RIGHTS ACQUIRED BETWEEN 1954 AND 1958?

[33] Finally, following on from his earlier finding that the respondents had failed to discharge the onus on them of proving that the said land became an excepted area only in 1964; and following his finding that the said land became an ex-Shell Concession Area as early as 1954, the learned Judicial Commissioner went on to consider whether the appellant could have acquired native customary rights over the said land between 1954 and 1 January 1958. After reviewing the evidence on the point, the learned Judicial Commissioner found that the appellant had not done so because the evidence showed that after the appellant moved out from the said land for his work purposes, the house he lived in was destroyed by fire in 1941 although the fruit trees were still there. Relying on that evidence the learned Judicial Commissioner said:

From the aforesaid testimonies it can be concluded that the plaintiff had moved out from Pujut Padang Kerbau before the said house was destroyed by fire in 1941 since he claimed that the said house was still on the land at the time he moved out. There is also no other evidence before this court that the plaintiff had acquired

native customary rights by any of the methods specified in sub-s 5(2) beginning from1954 to 1958.

[34] The approach which the learned Judicial Commissioner took in deciding this question and the findings he arrived at on the same, give rise to one of the appellant's main grounds of appeal.

[35] Having come to the above findings on the second issue, the learned Judicial Commissioner found that since the appellant had not acquired any native customary rights over the said land, there was no requirement to extinguish such rights or to pay any compensation to the appellant in respect of the same. He therefore decided the third issue against the appellant and dismissed his claim.

[36] The appellant's main grounds of appeal are that the learned Judicial Commissioner erred in law when he failed to fully appreciate the legal consequences that flowed from the respondents adopting a plea of confession and avoidance. Mr Sandhu of counsel for the appellant submitted that the learned Judicial Commissioner had accepted that since the respondents had adopted a defence of confession and avoidance, they took upon themselves the evidential burden of proving that the said land remained within the Shell Concession Area until at least 1 January 1958 so as to avoid the legal consequences of their admission that the appellant had acquired native customary rights to the said land before 1 January 1958. Mr Sandhu further contended that once the learned Judicial Commissioner had come to a finding that the said land was excepted from the Shell Concession Area as early as 1954, he should have given effect to that finding by entering judgment for the appellant in terms of his prayer 1(i) and 3. Mr Sandhu submitted that the learned Judicial Commissioner erred in law when he failed to do so because what that finding meant was that the respondents had failed to discharge their onus of avoiding their admission that the appellant had acquired native customary rights to the said land prior to 1 January 1958. Put in nother way, since the respondents were only able to show that the said land remained within the Shell Concession Area until 1954, by their plea of confession and avoidance, they must be taken to have admitted that between 1954 and 1 January 1958 the appellant had acquired native customary rights to the said land.

[37] Under the same ground of appeal, the appellant also complains that it was a misdirection for the learned Judicial Commissioner to have asked himself whether the appellant had acquired native customary rights between the period beginning from 1954 to 1 January 1958. Mr Sandhu contends that this question should not have been considered at all because when the respondents admitted the appellant's assertion that he had acquired native customary rights over the said land before 1 January 1958, which would include the period beginning from 1954 to 1 January 1958 as well, once the respondents were unable to prove that the said land remained within the Shell Concession Area until at least 1January 1958 they became bound by their admission thereby rendering the question no longer open for determination.

[38] The appellant further complains that even if it can be successfully argued that it was open to the learned Judicial Commissioner to consider whether the appellant had acquired native customary rights to the said land between 1954 and 1958, further errors of law were committed by the learned Judicial Commissioner when he held that the appellant had not done so because the appellant had not acquired such rights in the manner specified in s 5(2) of the Land Code. According to the appellant the said sub-section is applicable only to claims to native customary rights created or acquired after 1 January 1958, whereas it was not in dispute here that the appellant claimed such rights had been created or acquired before that date.

[39] From his judgment, it is clear to us that the learned Judicial Commissioner did accept it that the respondents had adopted a plea of confession and avoidance when he said (at pp 21 and 22 of the record of appeal):

> The crucial issue for determination at this stage are firstly when did the said land become an excepted area for it to be known as an ex-shell concession area and secondly on whom lies the burden of proving the same.
>
> …
>
> On the burden of proof I agree with the submission of the learned counsel for the plaintiff that the burden of establishing the defence based on the said land being Shell Concession Area is on the defendants by virtue of the plea of confession and avoidance and of ss 103 and 104 of the Evidence Act 1956 (see *Jacob & Goldrein's Pleadings, Principle and Practice* [1990] at pp 133–134.

[40] We find the passages which the learned Judicial Commissioner referred to at pp 133–134 of *Jacob and Goldrein's Pleadings Principles and Practice*, instructive. They deal with the meaning of the plea of 'confession and avoidance' and the burden of proof arising from such a plea. The relevant parts of the passages read:

> Confession and Avoidance Meaning
>
> The term 'confession and avoidance' is the description of a plea in the defence which, while expressly or impliedly admitting or confessing or assuming the truth of the material facts alleged in the statement of claim, seeks at the same time to avoid or destroy the legal consequences of those facts. The plea is invoked by alleging fresh or additional facts to establish some legal justification or excuse, or some other ground for avoiding or escaping legal liability. The defendant, as it were, 'confesses' the truth of what is alleged against him but proceed immediately to 'avoid' the effect of such allegations.
>
> Material facts and burden of proof
>
> The defendant must plead all the material facts relied on as constituting the 'avoidance' of what he otherwise confesses or admits to. The burden of proof is upon him to prove those facts …

[41] Reverting to the facts of this appeal, we are satisfied that by para 3 of their defence, the respondents had invoked the plea of confession and avoidance, by expressly admitting or confessing to or assuming the truth of the material facts alleged in paras 3 and 4 of the appellant's statement of claim, but seeking to avoid the legal consequences of those facts by alleging that the said land was ex-Shell Concession Area. Accordingly, we concur with the finding of the learned Judicial Commissioner that the respondents had adopted a plea of confession and avoidance and that consequently they carried the burden of proving the facts they pleaded by way of avoidance.

[42] In an attempt to extricate themselves from the consequences of having adopted such a plea, learned counsel for the respondents contended before us, as he did before the learned Judicial Commissioner, that para 3 of the defence was not a plea of confession and avoidance. Instead, he contended that the whole of the respondents' defence should be read, which will show that there was no admission of the appellant's claim, but a complete denial and dispute of the appellant's claim to have acquired or created native customary rights over the said land.

[43] We do not agree with the submission of the respondents. In the first place, the respondents did not appeal against that part of the decision of the learned Judicial Commissioner that decides that since the respondents had adopted a plea of confession and avoidance, they carried the burden of proving the facts relied on by them to avoid the consequences of that plea. In the second place, even when the relevant paragraphs of the respondents' defence relating to the appellant's claim to native customary rights are read as a whole, they do not have the effect of undoing the plea of confession and avoidance which the respondents had adopted. As a matter of procedural law it was open to the respondents to take a safe course by first denying the material facts pleaded in paras 3 and 4 of the statement of claim and then by way of alternative defence to raise a plea of confession and avoidance, but this is not what the respondents have done here where the respondents chose to expressly admit the material facts upon which the appellant claimed to have acquired native customary rights, but invoking the plea of confession and avoidance by alleging fresh facts i.e. that the said land was 'ex-Shell Concession Area', to avoid or escape legal liability for what they had admitted to. In this regard, useful reference may again be made to what *Jacob & Goldrein's Pleadings, Principles and Practice* has to say on the matter at p 134:

> Pleading techniques
>
> A plea of confession and avoidance may be, and often is, raised as an alternative, to a traverse of allegations made in the statement of claim. This is the safe course, as the defendant gets the best of both worlds, since he denies those allegations, but alternatively confesses and avoids them. If, however, the plea of confession and avoidance is the sole plea to such allegations, the defendant will be bound by his confession, and will be precluded thereby from denying the facts as alleged in the statement of claim.

[44] We find that what is said in the above passage aptly describes what has happened in this case. Here the plea of confession and avoidance was not any alternative plea; it was the sole plea to the material allegations made by the appellant in paras 3 and 4 of the statement of claim. The respondents are accordingly bound by their plea.

[45] In the third place, it was suggested during submissions that when the respondents pleaded in para 3 of their defence that they 'further put the plaintiff to strict proof thereof, these words somehow served to deny the appellant's claim to native customary rights. We do not agree. We just do not see how these words, which certainly do not deny the appellant's claim and which really mean nothing since the respondents had already admitted the material allegations made in paras 3 and 4 of the statement of claim thereby leaving nothing more for the appellant to prove, had the effect of completely denying the appellant's claim and neither has counsel for the respondents advanced any reason why or how these words did so. Likewise, it was suggested during submissions that when the respondents pleaded in para 4 of their defence that 'the first and second defendants deny that the plaintiff had acquired any native customary right and say that there is no need to extinguish any right as contain (sic) in para 5 (we think they mean para 4) of the statement of claim', the respondents had denied the appellant's claim to such rights. We do not agree. The respondents have overlooked the fact that the appellant was not by para 4 setting up a new or separate claim to native customary rights under that paragraph. What the appellant was doing was merely repeating his claim to the same native customary rights which he had alleged in para 3 of the statement of claim; hence the reference to 'the said' native customary rights in para 4. So when the respondents denied that the appellant had acquired any native customary rights in para 4 of their defence, they were merely repeating what they had sought to avoid when invoking the plea of confession and avoidance in para 3 of their defence.

[46] In our judgment the learned Judicial Commissioner erred in law when he failed to appreciate that once he found that the respondents had failed to discharge their burden of proving the facts relied on by them to avoid the legal consequences of their admission of the appellant's claim to have acquired native customary rights to the said land prior to 1 January 1958, the appellant became entitled to judgment as the respondents were bound by their admission which meant that at the very least, during the years beginning from 1954 until 1 January 1958, when the said land was no longer reserved as Shell Concession Area, the appellant had acquired native customary rights to the said land.

[47] In support of what we say we would refer to *Sarkar's Law of Evidence* at p 313 under the topic 'Admissions in Pleadings' where it is said:

> Admissions in pleadings or judicial admissions stand on a higher footing than evidentiary admissions. The former are fully binding on the maker and constitutes

a waiver of proof whereas the latter are not conclusive and can be shown to be wrong. (*Nagindas v Dalpatram* AIR 1974 SC 471). Admissions in pleadings or judicial admissions by themselves can be made the foundation of the rights of the parties (*Satish Mohan Bindal v State of UP* AIR 1986 All 126, 128; 1985 All CJ 507).

[48] We also refer to p 1344 of *Sarkar* where the learned author discusses general principles regulating the burden of proof where it states:

> When the issue raised in substance is whether the plaintiff's or defendant's story is true, it is possible that neither of them may be true. The question then arises which of the two alternatives of the issue is the really material one. Usually the really material one is the first of the issue — Is the plaintiffs case true? If the defendant's defence is a plea in confession and avoidance, viz a plea which admits that the plaintiffs story is true but avoids it, then if the defendant fails to prove his case, the plaintiff may recover.

[49] In our judgment, it must also follow that once the respondents become bound by their admission that the appellant had acquired native customary rights over the said land prior to 1 January 1959, which must, by necessary implication, include that period commencing 1954 until 1 January 1958, it was no longer open to the learned Judicial Commissioner to enter into a consideration of whether the appellant had acquired any native customary rights between 1954 and 1 January 1958. He misdirected himself when he did so.

[50] Even if it can be successfully argued that it was open to the learned Judicial Commissioner to consider the question whether the appellant had acquired native customary rights between 1954 and 1 January 1958, we agree with counsel for the appellant that the learned Judicial Commissioner erred when he held that the appellant had not done so. The learned Judicial Commissioner arrived at that conclusion for two reasons. First, he found that the appellant had moved out from the said land before the house on it was destroyed by fire in 1941 and, secondly there was no other evidence that the appellant had 'acquired any native customary rights by any of the methods specified in sub-s 5(2) during the period beginning 1954 to 1958'.

[51] With respect, the learned Judicial Commissioner erred in both these findings. With regard to his first finding that the appellant had lost his rights because he moved out of the land in 1941, the learned Judicial Commissioner seems to have ignored the testimony of the appellant that even after the fire had destroyed the house in 1941, the fruit trees were still there and he continued to visit the land once a month. The learned Judicial Commissioner appears to have equated occupation with actual physical presence on the said land when that need not necessarily be so. In *Hamid bin Matusin v Superintendent of Lands & Surveys & Anor* [1198] MD 2, Haidar J. (as he then was) accepted and applied the meaning assigned to the word 'occupation' by Lord Denning in *Newcastle City Council v Royal Newcastle Hospital* [1959] 1 All ER 734 at p 736, where he said:

Occupation is a matter of fact and only exists where there is sufficient measure of control to prevent strangers from interfering: See *Pollock and Wright* on *Possession*, pp 12 and 13. There must be something actually done on the land, not necessarily on the whole but on part in respect of the whole. No one would describe a bombed site or an empty unlocked house as 'occupied' by anyone, but anyone would say that a 'farmer' occupies the whole of his farm even though he does not set foot on the woodlands within it from one year's end to another'.

[52] So just because the appellant did not live on the said land does not mean that he was no longer in control of it or did not occupy it. In fact he said he visited the land once a month and even corresponded with the government over it, requesting to be issued with a title to it. There was also other evidence before the court to show that even though the appellant did not reside on the said land, the fruit trees there remained on the said land even as recently as 1975. PW3 who was a Jabatan Kerja Raya employee testified that he saw fruit trees and rubber trees when he entered the land to do earthworks in 1975. There was also the letter dated 26 March 1982 written to the first respondent by Temenggong Haji Muip bin Tabib the Head of the Malay Community in Miri, supporting the appellant's application for a title to the said land and which stated that the appellant's father Kilong bin Dullah was in occupation of the said land before it became Shell Concession Area and that the fruit and rubber tress on the said land could still be seen from the road side.

[53] With regard to the learned Judicial Commissioner's second finding, wefind that it was a misdirection to apply s 5(2) of the Land Code to decide this question because the methods specified in s 5(2) for the creation of native customary rights are only applicable as from 1 January 1958, whereas the issue which the learned Judicial Commissioner was concerned with was whether such rights had been created or acquired between 1954 and 1 January 1958; and proviso (ii) of s 5(2) of the Land Code expressly directs that that question shall be determined by the law in force immediately prior to the 1 January, 1958. Whatever that law was which applied to the said land, the respondents are deemed to have admitted the appellant's claim to have acquired native customary rights between 1954 and 1958, when the respondents failed to prove that the said land became an excepted area only after 1958.

[54] The appellant's appeal should be allowed on these grounds alone but we find that there are other grounds to do so as well.

[55] The appellant's next ground of appeal is that the learned Judicial Commissioner erred in law when he found that the appellant had not acquired native customary rights to the said land before it became part of the Shell Concession Area in 1921. We have already indicated the basis of the appellant's claims to have acquired such rights prior to 1921. It will be recalled that the learned Judicial Commissioner came to the decision he did as he found that the 1920 Regulations were no longer in force immediately before 1 January 1958. According to the learned Judicial Commissioner, the 1920 Regulations were

repealed by the 1931 Order and it was only under the 1933 Order that native customary rights were first given recognition. It is the submission of counsel for the appellant that the learned Judicial Commissioner erred when he came to the above findings. For the reasons that follow we agree with counsel for the appellant.

[56] In the first place, although the 1931 Order states that upon its coming into force, all previous orders and regulations dealing with land (except the 1921 Order and Order xxi of 1922) are repealed, the learned Judicial Commissioner completely overlooked the fact that the 1931 Order expressly preserved the validity of anything done or effected, or of any right, title or interest created under the orders and regulations that were repealed, including the 1920 Regulations, by virtue of the proviso found in s 2(i) of the 1931 Order which reads:

> 2(i) On the coming into force of this Order, all previous Orders and Regulations dealing with land, whether or not included in Schedule A to this Order, except Orders No xxix and xxi of 1921 and 1922 respectively, shall be hereby repealed; provided that except as is herein specially otherwise enacted, nothing shall affect the past operation of those Orders or Regulations or the validity or invalidity of anything done or effected, or of any right, title or interest created under those Orders or Regulations, before the commencement hereof.

[57] Now, although it is stated in sub-s (ii) of s 2 of the 1931 Order that 'this Order shall be retrospective unless the context of any section clearly indicates a contrary intention', the sub-regulation is expressly stated to be 'subject to the proviso contained in sub-s (i) of this section'. So the 1931 Order did not have the effect which the learned Judicial Commissioner thought it had. He further failed to appreciate that the Land Ordinance Cap 27 continued to preserve rights acquired under laws relating to land previously in force before its commencement when it stated in s 2 that:

> The provisions of this Ordinance shall be retrospective, unless the context of any section clearly indicate a contrary intention:
>
> Provided that, except as is herein expressly otherwise enacted, nothing in the Ordinance shall affect the past operation of laws relating to land previously in force, or the validity or invalidity of anything done or affected; or of any right, title or interest created under those laws, before the commencement of this Ordinance.

[58] Further, when the 1933 Order was passed, rights acquired before its passing, which would include native customary rights, continued to be preserved because s 1(ii) of the 1933 Order expressly states that the operation of the 1931 Order (which preserved the validity of anything done under the 1920 Regulations) shall not be affected. Section 1(ii) and (iii) of the 1933 Order read:

Section 1:

(ii) On the coming into force of this Order in any area the provisions of Order No L–2 (Land) 1931 (ie the 1931 Order), and all rules made thereunder shall be deemed to have been repealed in such area.

(iii) Nothing except as herein specially otherwise enacted shall affect the operation of Order No L–2 (Land) 1931, or of any rule made thereunder or the validity of anything done or suffered or interest created thereunder before the coming into force of this Order.

[59] Even when the Land (Land Classification) Ordinance 1948 (ie the 1948 Ordinance) was passed, to classify lands in Sarawak, there was nothing stated in it to affect rights acquired prior to its passing, such as under the1920 Regulations. And in 1958 when the Land Code was enacted, s 5 only governs the creation or acquisition of native customary rights from 1 January 1958 onwards and did not affect such rights which were acquired before that date.

[60] In the second place, we do not agree with the learned Judicial Commissioner's conclusion that the 1920 Regulations did not give any recognition to the acquisition or creation of native customary rights which, according to him, were first given recognition in Sarawak under s 66 of the 1933 Order. In our view from as early as the Rajah's Order ix of 1875 native rights to clear and plant land were already recognised. That Order reads:

> Whereas it is a common practice among the native community to make large clearings of old jungle and afterwards abandon them, I hereby direct that should any clearance of the kind be made in future, and the persons who cleared the ground allow the same to go uncared for, they will lose all claim or title to such land; and should anyone be desirous of making gardens thereon, they will be permitted to become squatters; and notice is hereby given that should the original clearers try by any means to molest any such squatters they will render themselves liable to a fine at the rate of $10 (ten dollars) per hundred fathoms square for all the land they may have cleared, they having destroyed useful jungle produce, such as firewood, rattans etc, for no purpose.

[61] The reference to the natives losing all claim or title to land which they have cleared but allowed to go uncared for is, in our view, a clear recognition by the Rajah that if the land is cleared by a native and then planted up and cared for, his claim to it will be recognised.

[62] Coming to the 1920 Regulations itself, in our view a proper reading of the relevant provisions of the 1920 Regulations do not support such a conclusion. We find that the following provisions in the 1920 Regulations show that the Rajah did recognise native customary rights. Section 2 defines 'a native' as 'a natural born subject of His Highness the Rajah', and 'State land' as 'all lands which are not leased or granted or lawfully occupied by any person ...'. Then s 3 goes on to state that for the purposes of the 1920 Regulations, State land is divided into the following classes: (a) Town and Suburban lands; (b) Country lands of 100 acres and over; (c) Country lands of under 100 acres; (d) Native holdings. Section 22 of the 1920 Regulations which deals with Native Holdings reads:

(i) Under this part lands may be occupied by Natives free of all charges for the cultivation of fruit trees, padi, vegetables, pineapples, sugar cane, bananas, yams and similar cultures in accordance with the customary laws provided that where possible claims to fruit groves and farming lands shall be registered. Records of such claims shall be kept by all Native Headmen and also in the Land Office in each district.

(ii) A certificate in the form of Schedule A of Notification No … of 1920 may be issued to registered land holders under this part.

[63] The other relevant provision in the 1920 Regulations is s 30A which reads:

> Whenever the Government resumes possession of any occupied land for any purpose, claims for compensation shall be made to the Superintendent who will determine the amount.

[64] In our judgment, when the Rajah proclaimed in the 1920 Regulations that a native may occupy and cultivate land, including State land, free of charge, in accordance with customary laws, what the Rajah was according recognition to was not so much the right of a native to occupy land for cultivation, but the right by which he did so ie his customary laws. Hence the selective recognition by the Rajah of such right according to the customary laws of the natives only, and not, for example, to the customary laws of other races like the Chinese. This to our minds was a clear recognition accorded to native customary rights in an Order passed by the Rajah. Such recognition was further confirmed by the fact that if Government resumed possession of any occupied land, claims for compensation may be made to the Superintendent, even if occupied by a native.

[65] According to the learned Judicial Commissioner native customary rights could not be acquired under the 1920 Regulations because s 22 of that Regulation 'only provides the native who is registered thereunder to the right of occupancy of and not the right to title over the land', and that in his view 'the creation of native customary rights in land under the law relating thereto must mean the creation or acquisition of rights attached to the land where the person having such right may be issued with a title thereto or be paid compensation for the extinguishment of such rights'. Put in another way, the learned Judicial Commissioner was of the view that it was only if a native was issued with a title to the land he occupied by way of customary law that his native customary rights were recognised.

[66] With respect, there can be no justification for reading into s 22 a requirement for the issuance of a title as a precondition to the recognition of native customary rights under the 1920 Regulations, when s 22 itself does not require it. Further s 22 of the 1920 Regulations expressly states that it is only 'where possible' that claims to fruit groves and farming land shall be registered.

Registration, therefore, was not a must. So if the 1920 Regulations recognised a native's right to occupy land for cultivation in accordance with customary laws even without his claim being registered, why should it make a difference whether he is issued with title to such land before the same right is recognised? We cannot think of any good reason why that should be so.

[67] With regard to the learned Judicial Commissioner's finding that native customary rights were first given recognition in Sarawak under s 66 of the 1933 Order, we note that he came to this conclusion as he accepted as correct, the contention of the respondents that there must first be laws or regulations authorising natives to create or acquire native customary rights before such rights could be created or acquired, and that s 66 of the 1933 Order was the first such law. With all respect, we do not agree. In the first place, the reference by the Rajah to 'customary laws' in s 22 of the 1920 Regulations is significant, in that, it shows that customary laws were being given recognition to as a pre-existing law, without its existence having to depend on any specific legislation 'creating' it as suggested by the respondents. In effect, therefore, by the 1920 Regulations, the Rajah acknowledged that before his rule of Sarawak began, the indigenous people already had a pre-existing system of customary laws concerning land, which he recognised and gave effect to. We find the position well explained by AF Porter in his paper '*The Development of Land Administration in Sarawak from the Rule of Rajah Brooke to the Present Time (1841 – 1965)*' at p 18. The passage we are about to set out is taken from the judgment of Ian Chin J (at p 268) in *Nor Anak Nyawai v Borneo Pulp Plantation Sdn Bhd* [2001] 6 MLJ 241, a case referred to by Mr Sandhu. The passage reads:

> At the time of James Brooke's arrival in Sarawak there had for centuries been in existence in Borneo and throughout the eastern archipelago a system of land tenure originating in and supported by customary law. This body of custom is known by the generic term 'Indonesian Adat'. Within Sarawak the term 'adat', without qualification, is used to describe this body of customary rules or law; the English equivalent is usually 'native customary law' or 'native customary rights'.

[68] We accept what AF Porter said on the matter. In our view it accords with the position accepted by our courts and the courts in other jurisdictions which have had to consider the position of customary laws practiced by the local indigenous people vis-a-vis the arrival of a new sovereign or ruling power. In *Adong bin Kuwau & Ors v Kerajaan Negeri Johor & Anor* [1997] 1 MLJ 418 (a case which was upheld on appeal) the court affirmed that the common law respects the pre-existing rights under native law or customs of the aboriginal people in Malaya. In coming to his decision in that case Mokhtar Sidin JCA referred to the decision in the Canadian case of *Calder v Attorney-General of British Columbia* (1973)34 DLR (3d) 145 which recognised that tribal Indian interest in their ancestral lands constituted a legal interest which predated European settlement. And more recently in the case of *Nor Anak Nyawai v Borneo Pulp Plantations Sdn Bhd* at p 245, Ian Chin J, pointed out that in *Calder*'s case, Hall J,

in his dissenting judgment at p 218 rejected as wholly wrong the 'proposition that after conquest or discovery the native people have no rights at law except those subsequently granted or recognised by the conqueror or discoverer'.

[69] Further, what was said by Porter also reflects the aims and policy of the then Government of the day, which was to recognise native customary rights to land and to record and protect these rights so that the various communities would not lightly dispose of their rights to others. On 21 November 1939 JB Archer the Chief Secretary issued Secretariat Circular No 12/1939 dealing with Native Land Tenure. For present purposes it will only be necessary to refer to the first three paragraphs of the Circular. Paragraph 1 of the Circular which expresses the aim of Government states:

> 1 The Land Orders recognise native customary rights to land, but give little guidance on the subject; the law of customary tenure is wrapped up with that of inheritance and neither has yet been adequately codified. It is the aim of Government to record and protect these customary rights and to prevent the various communities from impoverishing themselves by disposing lightly of their rights to others, whether alien or native. The following notes are the first step towards a better appreciation of the position and it is expected of every officer mat he will study the subject and assist the Secretary for Native Affairs and the Superintendent of Lands and Surveys by suggestion and constructive criticism.

[70] Paragraph 2 of the Circular reads:

> 2 It is realised that only proper land settlement can satisfactorily accomplish the recording of native rights and that only from case records can the customary law be codified. It is thought, however, that the action now to be taken will facilitate such land settlement and will go a long way towards realising the aim set out above. The education of each community to a sense of responsibility and of its elders to the point of making decisions in matters of adat without an eye to 'what Government wants' will be a big step forward'.

[71] Paragraph 3 of the Circular which deals with customary tenure states:

> 3 All natives of Sarawak follow Indonesian adat to a greater or lesser degree and that adat, as regards the customary tenure of land, is briefly as follows:
>
> (i) The right to cultivate cleared land rests in the community with priority to the heirs of the original feller of big jungle. This right must be exercised in accordance with a cycle compatible with the preservation of the maximum fertility of the land (and no longer) by methods of cultivation within the reach of the community. The cycle is,in their eyes, not a matter for rule of thumb but for expert native opinion.
>
> (ii) Where not inconsistent with the above, the existence of permanent cultivation of a reasonable density is evidence of customary ownership as opposed to customary right of user.

(iii) Individual ownership is limited by the customary right of the community to a say in the matter of disposal to anyone outside the community.

(iv) No community or individual may hold up land in excess of requirements and, the extreme case,removal to another district automatically extinguishes all rights of user.

[72] It will be noted that even in the 1939 Secretarial Circular, which was issued well after the 1933 Order, the government did not say that claims to native customary rights over land would only be recognised if registered or issued with a title in respect thereof.

[73] The other reason why the learned Judicial Commissioner found that no native customary rights had been acquired before 1921 was that, even if the appellant had acquired such rights under the 1920 Regulations, such rights were extinguished when the said land was reserved as part of the Shell Concession Area under the 1921 Order. We do not agree with this finding. Itis quite evident to us from his finding that the learned Judicial Commissioner considered the 1921 Order applied with retrospective effect so as to take away any native customary rights that might have been acquired before its operation. With respect, this is a misdirection by the learned Judicial Commissioner. Itis a well accepted rule of statutory interpretation that 'a statute should not be held to take away private rights of property without compensation unless the intention to do so is expressed in clear and unambiguous terms'. (See *Colonial Sugar Refining Co v Melbourne Harbour Trust Commissioners* [1972] AC 343 at p 359). In similar vein is the decision of the Privy Council in *Yew Bon Tew & Anor v Kenderaan Bos Mara & Anor* [1983] 1 MLJ 1 at p 148 where it was held:

> Apart from the provisions of the Interpretation Statutes there is at common law a *prima facie* rule of construction that a statute should not be interpreted retrospectively so as to impair an existing right or obligation unless that result is unavoidable on the language used. A statute is retrospective if it takes away or impairs a vested right acquired under existing laws, or creates a new obligation, or imposes a new duty, or attaches a new disability, in regard to events already past.

[74] So the question to be asked is, was the intention to interpret the 1921 Order retrospectively expressed in clear and unambiguous terms, so as to enable the learned Judicial Commissioner to give it that effect when he said that it extinguished any native customary rights that the appellant may have acquired to the said land under the 1920 Regulations? This question is best answered by first looking at what the 1921 Order states. It reads:

> Order No XXIX, 1921
>
> Regulations for issue of Land Permits in Miri District.
>
> 1 The area of land in Miri District which is bounded approximately by a link commencing at Tanjong Lobang and thence proceeding inland along the northern eastern side of the Miri hills to the

confluence of the Sungei Dalam and the Miri river thence along the seashore to Tanjong Lobang is with the exception of such parts thereof as are already dedicated to Government or public purposes reserved for the operation of the Sarawak oilfields Limited.

Note — A map showing the area so reserved may be inspected at the Government Office, Miri.

2 Notice is hereby given that no person may erect any building of a permanent nature or plant up any land within the area so reserved without having obtained a permit for the purpose.

3 No such permit may be issued unless (a) the Government Officer to whom application for the same is made is satisfied after reference to the General Manager of Sarawak Oilfields Limited that the issue of the permit will not interfere with the operations of that Company or (b) the General Manager approves of the permit being issued.

4 All persons occupying land under permit are reminded that the land so occupied belongs to the Government and in the event the same being required such persons may only claim compensation for any buildings erected or products planted on the land in accordance with the terms of the permit.

[75] In our judgment there is nothing said in the 1921 Order to give it retrospective application. We agree with Mr Sandhu that there is no clear expression in the said Order that the restrictions contained therein apply to lands where native customary rights had been acquired or created before such lands became part of the Shell Concession Area; nor did the 1921 Order provide for the resumption of such lands or the extinguishment of such rights. In the circumstances the learned Judicial Commissioner's finding on this point cannot be supported.

[76] It must also follow from what we have just said that the finding of the learned Judicial Commissioner that the appellant was in unlawful occupation of State land while it was part of the Shell Concession Area cannot be supported.

[77] For all the reasons given above, we would allow the appeal. We set aside the decision given by the Court below on 13 November 2000 and enter judgment for the appellant in terms of his prayer 1(i) and for damages to be assessed. We also order that costs here and the court below be awarded to the appellant to be taxed.

[78] By the time this appeal was heard, the appellant Salleh bin Kilong had passed away. We allowed an application to substitute his son Madeli bin Salleh as plaintiff/appellant, he being the administrator of his estate. The substitution has been reflected in the parties named in this judgment.

Appeal allowed.

Reported by Loo Lai Mee